FILED
APR 11 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-465

IN THE

Supreme Court of the United States

MOHAWK INDUSTRIES, INC.,

Petitioner,

v.

SHIRLEY WILLIAMS, GALE PELFREY, BONNIE JONES, AND LORA SISSON, individually and on behalf of a class,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF PETITIONER

CARTER G. PHILLIPS*
RICHARD D. BERNSTEIN
JUAN P. MORILLO
STEVEN T. COTTREAU
JULIE A. GURLEY
MATTHEW J. WARREN
JIMMY R. ROCK
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

April 11, 2006

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF OF PETITIONERS	1
I. RICO DOES NOT PERMIT A CORPORATION TO BE A MEMBER OF AN ASSOCIATION-IN-FACT ENTERPRISE	1
A. RICO Consistently Uses "Includes" To Introduce Comprehensive Definitions	2
B. Respondents And The United States Seek To Redraft The Definition Of "Enterprise"	5
II. RESPONDENTS ALLEGE AN INJURY CAUSED BY MOHAWK'S CONDUCT OF ITS OWN AFFAIRS	9
A. The United States Would Effectively Permit Every Conspiracy To Be A RICO Enterprise	9
B. Respondents Do Not Allege That Mohawk Conducted The Affairs Of A Distinct Enterprise	12
III. RECOGNIZING RICO'S LIMITATIONS WOULD NOT HINDER CRIMINAL ENFORCEMENT	15
A. Most Association-In-Fact Enterprises Simply Could Be Repled	16
B. The Government Has Ample Avenues To Disgorge Criminal Proceeds	17
IV. RESPONDENTS' IMMIGRATION LAW ARGUMENTS ARE MISPLACED	20
CONCLUSION	20

TABLE OF AUTHORITIES

CASES Page

American Surety Co. v. *Marotta*, 287 U.S. 513 (1933) 6
Anza v. *Ideal Steel Supply Corp.*, No. 04-433 (U.S. argued Mar. 27, 2006) 13
Chevron U.S.A., Inc. v. *Echazabal*, 536 U.S. 73 (2002) 6
City of Chi. v. *Environmental Def. Fund*, 511 U.S. 328 (1994) 8
Continental Grain Co. v. *Barge FBL-585*, 364 U.S. 19 (1960) 3
Duncan v. *Walker*, 533 U.S. 167 (2001) 4
Faragher v. *City of Boca Raton*, 524 U.S. 775 (1998) 13
Federal Land Bank of St. Paul v. *Bismarck Lumber Co.*, 314 U.S. 95 (1941) 6
Groman v. *Commissioner*, 302 U.S. 82 (1937) 6
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. *Dabit*, No. 04-1371 (U.S. Mar. 21, 2006) 4
Phelps Dodge Corp. v. *NLRB*, 313 U.S. 177 (1941) 6
Reed v. *S. S. Yaka*, 373 U.S. 410(1963) 3
Reves v. *Ernst & Young*, 507 U.S. 170 (1993) 11
Sedima S.P.R.L. v. *Imrex Co.*, 473 U.S. 479 (1985) 8
Tyler v. *Cain*, 533 U.S. 656 (2001) 6
United States v. *Butler*, 954 F.2d 114 (2d Cir. 1992) 17
United States v. *Cincotta*, 689 F.2d 238 (1st Cir. 1981) 18
United States v. *Feldman*, 853 F.2d 648 (9th Cir. 1988) 16
United States v. *Goldin Indus., Inc.*, 219 F.3d 1271 (11th Cir. 2000) 16
United States v. *Monsanto*, 491 U.S. 600 (1989) 3

TABLE OF AUTHORITIES—continued

	Page
United States v. *New York Tel. Co.*, 434 U.S. 159 (1977)	6
United States v. *Perkins*, 596 F. Supp. 528 (E.D. Pa.), *aff'd sub. nom. United States* v. *Osser*, 749 F.2d 28 (3d Cir. 1984)	17
United States v. *Stolfi*, 889 F.2d 378 (2d Cir. 1989)	16
United States v. *Turkette*, 452 U.S. 576 (1981)	7, 15
United Steelworkers of Am. v. *R. H. Bouligny, Inc.*, 382 U.S. 145 (1965)	9
Western Union Tel. Co. v. *Lenroot*, 323 U.S. 390 (1945)	7
Willheim v. *Murchison*, 342 F.2d 33 (2d Cir. 1965)	5
Yee v. *City of Escondido*, 503 U.S. 519 (1992)	2

STATUTES

Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996)	20
Illegal Immigration Reform & Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996)	20
Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922	8
8 U.S.C. § 1324	20
18 U.S.C. § 371	15
18 U.S.C. § 981(a)(1)(C)	19
§ 982	18
§ 1956(c)(7)	19
§ 1961	2, 5
§ 1963(b)	3
§ 1963(b) (1970)	4
§ 1964	4, 13, 15
§ 3571(c)(3), (d)	18

TABLE OF AUTHORITIES—continued

	Page
21 U.S.C. § 853	3, 18
§ 881	18
29 U.S.C. § 501(c)	8

LEGISLATIVE HISTORY

139 Cong. Rec. S9923 (daily ed. July 30, 1993)	20
H.R. Rep. No. 104-22 (1995)	20
S. Rep. No. 91-617 (1969)	8

OTHER AUTHORITIES

S. Kilman, *Tyson Alien-Smuggling Trial Promises to Prove a Landmark*, Wall St. J. (Feb. 3, 2003)	18
C.J. Rehnquist, *Reforming RICO, in The RICO Racket* (G. McDowell ed., 1989)	17
U.S. Dep't of Justice, President's Corporate Fraud Task Force, Significant Criminal Cases & Charging Documents, *at* http://www.usdoj.gov/dag/cftf/cases.htm (visited Apr. 7, 2006)	19

REPLY BRIEF OF PETITIONERS

Petitioner's opening brief explained that the ruling below would transform a multitude of business disputes and ordinary conspiracies into federal RICO cases. The briefs of both respondents and the United States sweepingly confirm this. Indeed, on the Government's view of an "enterprise," it is difficult to conceive of an alleged conspiracy that would not fall within RICO's scope.

RICO, broad as it may be, is not that unbounded. Instead, RICO is aimed at the misuse of a distinct "enterprise." Indeed, the statutory limitations make plain that only individuals—not an ad-hoc grouping of a corporation and others—can form an association-in-fact enterprise. At the very least, a corporation's hiring and compensating of its own employees are the affairs of the corporation itself, not those of a separate new enterprise that is distinct from the corporation.

In the end, the Government's position rests on its view that the interpretation of RICO must be stretched beyond its language and purposes, otherwise some corporation might avoid liability and benefit from unlawful conduct. The Government, however, cannot cite a single example of this. The cases cited by the Government could easily be repled to comply with RICO's requirements. Moreover, corporations remain subject to both RICO liability and general criminal liability for predicate-act felonies committed by employees. The Government, as experience has proven, has ample tools flowing from a felony conviction to penalize the corporation and force the disgorgement of any ill-gotten proceeds.

I. RICO DOES NOT PERMIT A CORPORATION TO BE A MEMBER OF AN ASSOCIATION-IN-FACT ENTERPRISE.

As Mohawk explained in its opening brief, § 1961(4) expressly requires that an "association-in-fact enterprise"

consist of a "group of *individuals* associated in fact."[1] 18 U.S.C. § 1961(4) (emphasis added). See Pet. Br. 12-26. Neither the respondents nor the United States contend that corporations are "individuals" within the meaning of the statute. See U.S. Br. 6.

Rather, respondents and the United States argue that this Court should ignore the plain language of § 1961(4). According to them, the Court essentially should rewrite the definition of "enterprise" to read "any person or group." That is not, however, what the statute says.

A. RICO Consistently Uses "Includes" To Introduce Comprehensive Definitions.

Respondents' argument depends upon interpreting "includes" in § 1961(4) as illustrative, rather than comprehensive. In pressing for an illustrative interpretation, however, both respondents and the United States completely ignore the meaning of "includes" as it is used to introduce *three* other definitions in § 1961. The word "includes" introduces the definitions of "person," "documentary material," and "Attorney General." 18 U.S.C. § 1961(3), (9), (10). In each of these other subsections, "includes" plainly has a comprehensive—not an illustrative—meaning. See Pet. Br. 17-18. Indeed, neither respondents nor the United States

---

[1] Respondents—but not the United States—claim that this Court may not consider this specific argument because petitioner did not raise it below. Resp. Br. 12-14. But Mohawk consistently has contested the legal sufficiency of respondents' alleged "enterprise," an issue squarely raised by the Question Presented—"[w]hether a defendant corporation and its agents can constitute an 'enterprise' under [RICO]." "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992).

makes any effort to show that the use of "includes" in these other definitions is illustrative and not comprehensive.[2]

Moreover, one other RICO provision uses the term "includes" to introduce a definition, and it also uses that term in its comprehensive sense. Section 1963(b) provides that "[p]roperty subject to criminal forfeiture ... *includes* (1) real property, including things growing on, affixed to, and found in land; and (2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities." 18 U.S.C. § 1963(b) (emphasis added). This Court already has held that such a definition of property is comprehensive. In reviewing the identical definition in 21 U.S.C. § 853(b), which is also introduced by "includes," this Court held that it was an "all-inclusive listing." *United States* v. *Monsanto*, 491 U.S. 600, 607 (1989). As in § 1963(b), Congress used "includes" in § 1961 to introduce "all-inclusive" definitions, not lists of illustrations.

RICO itself expresses an understanding that "includes" was used comprehensively when it introduced detailed lists. In fact, when Congress used a form of "include" to introduce a

---

[2] Respondents' only response is to implausibly assert that "any definitions that begin with 'includes' must be read as exemplary rather than comprehensive." Resp. Br. 21. In fact, the only suggestion that any of these definitions in § 1961 *might* not be comprehensive comes from an *amicus* which, drawing from admiralty law, queries whether an object like a ship might be a RICO "person." *See* NASCAT Br. 17-18 n.40. But the "ancient admiralty fiction" of treating vessels as "persons" to permit an *in rem* proceeding is just that: a fiction, both archaic and peculiar to admiralty, that was indulged "to allow actions against ships where a person owning the ship could not be reached." *Continental Grain Co.* v. *Barge FBL-585*, 364 U.S. 19, 22-23 (1960). *See Reed* v. *S. S. Yaka*, 373 U.S. 410, 419 n.2 (1963) (Harlan, J., dissenting) (personalty of a ship is "a fiction whose principal modern function is as a procedural device to provide a convenient forum where none would otherwise be available"). That fiction does not extend to RICO, whose criterion for "person" — that it be "capable of holding a legal or beneficial interest in property" — is not met by ships.

detailed list but meant that list to be illustrative, Congress followed the term "including" with the phrase "but not limited to." See 18 U.S.C. § 1964(a) (twice using phrase); see also 18 U.S.C. § 1963(b) (1970) (using same phrase), *added by* Pub. L. No. 91-452, § 901, 84 Stat. 922, 943 (1970), *removed by* Pub. L. No. 98-473, § 302, 98 Stat. 1837, 2040 (1984). The United States suggests that in using this language Congress decided to "tak[e] a belt-and-suspenders approach." U.S. Br. 8 n.1. But the Government's "belt-and-suspenders" interpretation is merely window dressing for its real argument: the Court should ignore the words "but not limited to" as superfluous, contrary to a "cardinal principle of statutory construction." *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks omitted). The better interpretation is that this phrase, which indicates the term is being used illustratively, reveals that the naked use of the term "includes" is comprehensive in § 1961.

Like the other definitions in §§ 1961 and 1963(b), the definition of "enterprise" in § 1961(4) also uses "includes" in its comprehensive sense. Neither respondents nor any other party offers any rational explanation why the identical word "includes" should be interpreted in different ways in the same statute. "Generally, identical words used in different parts of the same statute are ... presumed to have the same meaning." *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Dabit*, No. 04-1371, slip. op. at 8 (U.S. Mar. 21, 2006) (internal quotation marks omitted) (omission in original).

Congress used language in § 1961(4) that was extremely specific about the types of entities that could constitute RICO enterprises. Where Congress wanted to ensure that the definition captured particular entities, it did so by employing broad catch-all language. Thus, the definition of enterprise in § 1961(4) begins with a list of legal entities and ends with the phrase "or other legal entity." By contrast, Congress did not follow the specific words at issue here—any "group of individuals associated in fact although not a legal entity"—

with the phrase "or any other group." This omission was no accident; it shows a clear intent to limit association-in-fact enterprises to groups of *individuals*, rather than groups of legal entities.

The language of § 1961(4) would make little sense if Congress meant "enterprise" limitlessly to encompass both any "legal entity" (as the statute says) and any ad hoc association (as the statute omits). But it is perfectly comprehensible if Congress's intent was only to reach (1) the corruption of any legal entity and (2) groups of individuals organized in criminal gangs. Indeed, the United States concedes that the purpose of including associations in fact was "to ensure that organized-crime syndicates are treated as covered 'enterprises.'" U.S. Br. 10 n.2. In short, § 1961(4) contains precisely the type of definition that Judge Friendly spoke about on the eve of RICO's passage—one that uses "includes" to set forth a comprehensive list. See *Willheim* v. *Murchison*, 342 F.2d 33, 41-42 (2d Cir. 1965).

B. Respondents And The United States Seek To Redraft The Definition Of "Enterprise."

The failure of respondents and the United States to dispute that "includes" has a comprehensive meaning in three other subsections of § 1961 completely undermines their other arguments. Respondents and the United States contend that, because the words "includes" and "means" are both used in § 1961, the two must have different meanings. See U.S. Br. 7-8; Resp. Br. 20-21. But that theory is flatly inconsistent with the other comprehensive uses of "includes" in § 1961's definitions of "person," "documentary material," and "Attorney General." 18 U.S.C. § 1961(3), (9), (10).

The cases relied upon by respondents and their *amici* are also inapposite. Those cases recognize that a statute's alternating use of the term "means" and the term "includes"

can signify that the two terms were "used synonymously."[3] *American Surety Co.* v. *Marotta*, 287 U.S. 513, 517 (1933). The United States expressly recognizes that "'the term 'includes' may sometimes be taken as synonymous with 'means,' and thus as introducing a comprehensive list.'" U.S. Br. 7 (quoting *Helvering* v. *Morgan's, Inc.*, 293 U.S. 121, 125 (1934)). Thus, contrary to respondents' contention, there is no "rule" on interpreting the term "includes" when the statute also uses the term "means." Rather, to determine the meaning of "includes," a statute must be analyzed "as a whole." *Marotta*, 287 U.S. at 517 (reviewing some of the 20 provisions that used "shall include" and comparing them to 11 provisions that used "shall mean"). None of the cases cited in support of respondents' position involved—like § 1961(4)—nearby subsections that employed "includes" in an unquestionably comprehensive fashion.[4]

---

[3] "Congress, needless to say, is permitted to use synonyms in a statute." *Tyler* v. *Cain*, 533 U.S. 656, 664 (2001).

[4] The cases cited by respondents and the United States are also inapposite for additional reasons. *First*, some cases interpret different, clearly exemplary phrasings of the term "includes." *See Chevron U.S.A., Inc.* v. *Echazabal*, 536 U.S. 73, 80 (2002) (interpreting "may include" as exemplary in light of its "expansive phrasing"). *Second*, others involve obviously incomplete listings. *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 188-89 (1941) ("including" phrase that introduced only one form of remedial action); *Marotta*, 287 U.S. at 517 ("persons shall include" introduced only women and corporations, but not men). *Third*, other cases hold that a form of "include" must be exemplary to avoid conflict with another provision of the statute. *See, e.g., Federal Land Bank of St. Paul* v. *Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) (comprehensive interpretation would render statutory exceptions superfluous); *Groman* v. *Commissioner*, 302 U.S. 82, 86 (1937) (comprehensive interpretation inconsistent with statute's express definition of "'includes' and 'including'"). *Finally*, other cases placed relied upon other factors not present here. *See United States* v. *New York Tel. Co.*, 434 U.S. 159, 169-70 (1977) (interpreting "includes" as illustrative in light of a number of factors, including Congress's express statement that warrants for pen registers were "'permissible'").

It is thus silly for respondents to contend that Mohawk seeks "a judicial amendment to § 1961(4)." Resp. Br. 25. On the contrary, it is respondents who would have this Court delete the phrase "of individuals" from the definition of "enterprise," so that any "group associated in fact" could constitute an enterprise. Resp. Br. 18.

The United States similarly urges this Court to abandon the definition Congress enacted. The Government offers as substitutes any "de facto alliance," U.S. Br. 4, 5, 6, 11 n.3, 12, 13, 14, 15, 20, and any "collaborative venture," *id.* at 5. It thus urges this Court to give the term enterprise its "natura[l]" meaning. U.S. Br. 12. Congress, however, expressly defined "enterprise" and "statutory definitions of terms ... prevail over colloquial meanings." *Western Union Tel. Co.* v. *Lenroot*, 323 U.S. 490, 502 (1945). Indeed, this Court has already applied this well-settled principle to reject an invitation to interpret "enterprise" based upon that term's general meaning. See Pet. Br. 18-19 (discussing *NOW* v. *Scheidler*, 510 U.S. 249 (1994)).[5]

At bottom, both respondents and the United States argue that Congress *ought* to have provided for associations in fact consisting of corporations and other entities. The Government asserts that "[t]here is no sound reason" for Congress to have omitted corporations from "the sort of de facto alliance that would constitute a RICO 'enterprise' if it were formed solely by natural persons."[6] U.S. Br. 14. This is

---

[5] Both respondents and the United States read out of context this Court's prior observation in *United States* v. *Turkette*, 452 U.S. 576, 580 (1981), that "[t]here is no restriction upon the associations embraced by the definition" of enterprise. *See* Resp. Br. 14; U.S. Br. 11. *Turkette* rejected revising the express definition in § 1961(4) to impose a requirement that the enterprise be "legitimate," noting that "no restriction" of the kind was included in § 1961(4).

[6] The United States also contends that this Court should ignore the rule of lenity in light of the Congress' statement that it should be "liberally construed to effectuate its remedial purposes." *See* U.S. Br. 15 & n.5.

hardly a reason to ignore the statutory language. Moreover, Congress never found that ad hoc associations of corporations posed any threat that was not already adequately addressed by existing criminal and civil remedies. See Pet. Br. 20-26.[7] As set forth below in Section III, those laws are more than adequate to deal with the harms identified by the Government. Simply because Congress chose not to use a sledgehammer to respond to a nonexistent problem is hardly "absurd," as respondents assert. Resp. Br. 15.[8]

Accord Resp. Br. 14. But, as this Court has already pointed out in *Sedima*, the two canons can be reconciled and the liberal construction maxim should apply in the "remedial" context—that is, § 1964's civil enforcement provisions. By contrast, "1961 and 1962 can be strictly construed without adopting that approach to 1964(c)." *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 491-92 n.10 (1985). There is no reason for the Court to revisit its reconciliation of the two and thus the rule of lenity provides yet another reason for the Court to find the enterprise in this case legally insufficient.

[7] Indeed, the legislative history is overwhelming on this score. The United States cites out of context a Committee Report notation that § 1961(4) encompasses "any associative group." U.S. Br. 10. The cited section was making the simple point that § 1961(4) would not reach only "legally recognized associative entities," but would also extend to criminal gangs. S. Rep. No. 91-617, at 158 (1969). If Congress had intended "enterprise" to mean "any association in fact of legal entities," it would have written § 1961(4) that way. *See City of Chi. v. Environmental Def. Fund*, 511 U.S. 328, 337 (1994) ("it is the statute, and not the Committee Report, which is the authoritative expression of the law").

[8] Incredibly, respondents also attempt to fit their alleged enterprise within the term "union" in § 1961(4). *See* Resp. Br. 19. Section 1961(4)'s reference to "union" is a reference to labor union. This is made plain by § 1961(1), which also uses the term "union" to describe violations of 29 U.S.C. § 501(c)—a statute that applies only to embezzlement from "labor organization[s]." 29 U.S.C. § 501(c). And this interpretation of "union" comports with Congress's oft-stated intention to use RICO to address organized crime's "infiltrat[ing] and corrupt[ing] legitimate ... labor unions." Pub. L. No. 91-452, 84 Stat. 922, 923 (1970); *see also, e.g.*, S. Rep. No. 91-617, at 78 (noting that "organized crime has moved into legitimate unions"). The express inclusion of "union" in § 1961(4) after the list of legal entities may have been in recognition of

II. RESPONDENTS ALLEGE AN INJURY CAUSED BY MOHAWK'S CONDUCT OF ITS OWN AFFAIRS.

Even if a corporation could be a member of an association-in-fact enterprise, respondents' RICO claim would still fail because respondents allege harm flowing from the operation of *Mohawk itself*, not from the conduct of a distinct enterprise. Respondents claim that they are Mohawk employees to whom Mohawk pays an inadequate wage because Mohawk allegedly hires other (unauthorized) workers. Under *Reves* and *Cedric Kushner*, respondents cannot name Mohawk as both the RICO enterprise and the defendant. In an effort to avoid this fatal defect in this claim, respondents allege an association-in-fact enterprise consisting of Mohawk and recruiting contractors. This Court should reject respondents' attempt to plead around the restrictions set forth in *Reves* and *Cedric Kushner*. No matter how pled, respondents § 1962(c) claim fails because the alleged injuries flow strictly from the actions of Mohawk qua employer, not from the actions of some other distinct entity.

A. The United States Would Effectively Permit Every Conspiracy To Be A RICO Enterprise.

The United States is completely candid: it asserts that the requirements set forth in *Reves* and *Cedric Kushner* have no application to association-in-fact enterprises. Instead, according to the Government, an association-in-fact enterprise "*by its nature* implies that the group should be regarded for purposes of RICO as an entity distinct from any single member." U.S. Br. 28 (emphasis added). On the Government's view, only two requirements are necessary to plead a § 1962(c) violation involving an alleged association-

---

the fact that, at the time of RICO's passage, it was not clear that labor unions were legal entities. *See, e.g., United Steelworkers of Am. v. R.H. Bouligny, Inc.*, 382 U.S. 145 (1965) (holding unincorporated labor union not a citizen for purposes of diversity jurisdiction).

in-fact enterprise: "a shared purpose among the members and a continuing organizational presence." *Id.* at 21.

It would be a rare conspiracy, if any, that would not meet these requirements. The "shared purpose" requirement certainly will be met by every alleged conspiracy, for the conspirators share the purpose of carrying out their alleged agreement to commit crime. See U.S. Br. 22-23. And, on the Government's capacious view, every real conspiracy will also meet the "continuing organizational presence" requirement. Thus, the United States' interpretation effectively would turn every conspiracy into an association-in-fact RICO enterprise. That is why the United States cannot give an example where a relationship creates a conspiracy but does not create a RICO enterprise. See U.S. Br. 23 & n.10.

Indeed, on the Government's theory, it is difficult to imagine a business dispute that could not be pled as a § 1962(c) violation, provided that more than one company were involved in some fashion. As the Government makes plain, carrying out a business deal or contract would furnish the "shared purpose." And, so long as the business relationship was not completely ephemeral, the necessary "continuing organizational presence" would be found.[9]

This position—that RICO subsumes every business dispute in which a plaintiff can plead a "conspiracy"—cannot be reconciled with *Reves*. *Reves* mandates that a RICO defendant must be shown to have participated in the conduct

---

[9] Respondents take an even broader position: a corporation is liable under § 1962(c) for wholly unilateral action because a corporation can form a distinct association-in-fact enterprise with its own employees or wholly-owned subsidiaries. *See* Resp. Br. 30-31 & n.103, 45-47. This rule, which would exclude all claims against corporations from the requirements set forth in *Reves* and *Cedric Kushner*, rightly has been and should be rejected. *See* Pet. Br. 31-33 (discussing rejection of association-in-fact enterprises consisting of corporations and their employees and of parent corporations and their subsidiaries); *id.* at 38-40 (explaining flaws in separate legal entity test).

of the affairs of a separate enterprise, not just the affairs of the RICO defendant itself. Under *Reves*, simply pleading the existence of a common purpose and continuing organizational structure with some third party is not enough. Instead of addressing this issue, the Government essentially ignores *Reves*, citing it just once in passing in the last paragraph of its brief. See U.S. Br. 29.

In *Reves*, a group of noteholders sued the note issuer's accounting firm under RICO, alleging the firm violated state and federal securities fraud laws. See *Reves* v. *Ernst & Young*, 507 U.S. 170, 175 (1993). In an attempt to recover treble damages, the noteholders alleged that the issuer was the enterprise and that the accounting firm, as the RICO defendant, participated in the conduct of the issuer's affairs. See *id.* at 185-86. Although the noteholders prevailed on their claims for securities fraud, this Court rejected their RICO claim because the accounting firm's actions did not constitute participation in the conduct of the issuer's affairs. See *id.* at 176, 185-86.

Respondents and the United States ask this Court to treat *Reves* as a mere pleading error case. In their view, all the *Reves* plaintiffs had to do was allege an association-in-fact enterprise consisting of the accounting firm and the issuer or some other third party (such as the note issuer's former general partner or former accountant, both of whom were separately convicted of tax fraud and had relationships with the accounting firm, see *id.* at 173). But *Reves* is not merely a case about artful, or inartful, pleading. To the contrary, the central holding of *Reves* is that RICO liability turns on more than an allegation that a defendant committed two or more predicate acts; a RICO claim must allege harm directly flowing from the defendant's participation in the conduct of the affairs of some *separate* RICO enterprise.

The alleged injury in this case, however, stems directly from Mohawk's conduct of its own affairs. Respondents allege that Mohawk hired them and Mohawk paid them a

"depressed" wage because of "Mohawk's employment and harboring of illegal workers." JA 16-17 (Compl. ¶ 45). Respondents could have sued Mohawk employees or the recruiters for allegedly conducting the affairs of Mohawk (as the enterprise) in an unlawful manner. But *Cedric Kushner* prevented respondents from suing Mohawk and naming it as the RICO enterprise. In an effort to evade *Cedric Kushner* (and reach the deepest pockets), respondents have attempted to plead an "association in fact" between Mohawk and its contractors (the recruiters). But respondents' alleged injury remains one that flows from Mohawk's conduct of its own affairs—its hiring and compensation practices. Respondents should not be permitted to evade the requirements of *Reves* and *Cedric Kushner*.

B. Respondents Do Not Allege That Mohawk Conducted The Affairs Of A Distinct Enterprise.

After proposing limitless rules of their own, respondents and the United States assert that petitioner's position in Section II of its opening brief is itself limitless. See Resp. Br. 26 (asserting that "no corporation ... could be prosecuted as a member of an association-in-fact enterprise"); U.S. Br. 21 (claiming that "business entities engaged in 'arms-length dealings' can *never* combine to form a RICO associated-in-fact enterprise" (citation omitted)). This is wrong.

Petitioner simply seeks an application of the principles that this Court already set forth in *Reves* and *Cedric Kushner* to alleged association-in-fact enterprises assuming that they can include corporations. Those principles, rooted in RICO's text, require meaningful participation in the affairs of an enterprise distinct from the RICO defendant. In *Reves*, this Court held that an accounting firm's preparation of audit reports and its client's financial statements only constituted participation in the conduct of the accounting firm's own affairs, not those of its client. Likewise, here, the hiring and compensating of employees constitutes participation in the

employer's affairs, not those of a separate entity. *Cf. Faragher* v. *City of Boca Raton*, 524 U.S. 775, 790 (1998) (employer responsible for employment actions like "hiring, firing, promotion, compensation, and work assignment"). Respondents' association-in-fact allegations do not convert these corporate actions into the affairs of a distinct entity.

Likewise, in the other RICO case on the Court's docket this Term, *Anza* v. *Ideal Steel Supply Corp.* (No. 04-433), plaintiff alleged that it was injured by its competitor's filing of false tax statements. Plaintiff in that case brought, consistent with *Reves* and *Cedric Kushner*, a § 1962(c) claim against the individual wrongdoers (the two owner-operators of National Steel Supply, Inc.) and pled National Steel as the distinct RICO enterprise. The *Anza* plaintiff, however, could not (and did not) sue National Steel itself under § 1962(c) and claim that National Steel's filing of its own corporate taxes constituted participation in the conduct of some distinct association-in-fact enterprise. Otherwise, the limitations set forth in *Reves* and *Cedric Kushner* would be meaningless.[10]

Contrary to respondents' assertions, the rule proposed by Mohawk would permit a corporation to be held liable under § 1962(c) when it participated in the conduct of the affairs of a distinct enterprise. Thus, for example, Mohawk could violate RICO if it sought unlawfully to direct the affairs of the recruiting firms in this case (which respondents do not and cannot allege). In addition, a corporation that formed an association with another company to engage unlawfully in a

---

[10] The issue of proximate causation presented in *Anza* is also relevant to this case. As in *Anza*, respondents here allege that Mohawk committed immigration fraud and, as an indirect result, caused their wages to be depressed. If this Court reverses or vacates in *Anza*, but does not decide to reverse in this case on the question presented, petitioner respectfully requests that this Court vacate and remand this case to the Eleventh Circuit in light of its decision in *Anza*. *See* 18 U.S.C. § 1964(c) (setting forth direct injury as a standing requirement, which as a jurisdictional requirement this Court always has the power to address).

truly distinct enterprise could violate § 1962(c). For instance, a baked goods manufacturer that forms with third parties a drug distribution enterprise would satisfy the distinctness requirement. Similarly, a law firm that agrees with others to operate an illegal gambling ring also would satisfy the distinctness requirement. In sum, a corporation could satisfy § 1962(c)'s distinctness requirement where it either operates another legal entity or joins with other entities to engage in a new—and thus distinct—business activity. Mohawk's hiring and compensating of its own carpet manufacturing employees, however, cannot be the activity of a distinct enterprise.

Indeed, to hold otherwise would permit the most routine business disputes and tort claims to be pled as § 1962(c) association-in-fact enterprise claims. See generally C.J. Rehnquist, *Reforming RICO, in The RICO Racket* 63, 65 (G. McDowell ed., 1989) ("Any good lawyer who can bring himself within the terms of the federal civil RICO provisions will sue in federal court because of the prospect of treble damages and attorneys' fees ...."). The briefs for the United States and respondents demonstrate how readily such claims could be asserted if their theories were adopted. In fact, the Eleventh Circuit below conceded that it "has never required anything other than a 'loose or informal' association of distinct entities" to establish an association-in-fact enterprise. Pet. App. 7a (two entities allegedly "engaged in a conspiracy" is all that is required to establish an association in fact).

At a minimum, this Court should reject the view of the Eleventh Circuit and the United States that any "loose or informal" association for a common purpose—*i.e.*, a conspiracy—also constitutes a RICO enterprise. Participating in the conduct of a distinct "enterprise" clearly suggests something different than joining a conspiracy.[11] It should

---

[11] RICO is an enterprise statute, not a conspiracy statute. Its substantive violations are based upon victimizing or conducting the affairs of a

require the operation or management of a truly separate entity. Moreover, the existence of such a distinct entity, or "enterprise," should be based upon something more than a series of arms-length business contracts between a corporation and numerous independent contractors who provide services for a period of time and then are replaced by successive contractors offering better services or more favorable terms. That is particularly true where, as here, these business relationships seek to do nothing more than further the corporate affairs of the RICO defendant. Absent the conclusion that every conspiracy can constitute a RICO enterprise, the allegations regarding Mohawk's hiring and compensation practices fall far short of satisfying the enterprise requirement.

III. RECOGNIZING RICO'S LIMITATIONS WOULD NOT HINDER CRIMINAL ENFORCEMENT.

The Government also raises two law enforcement objections to the interpretation of § 1961(4) that petitioner set forth in Section I of its opening brief: (a) many alleged enterprises are association-in-fact enterprises that include corporations, and (b) bringing RICO suits against individuals would permit corporations to retain the proceeds of unlawful

---

distinct enterprise: RICO did not create an offense of participating (through a pattern of racketeering) in a conspiracy. *See* 18 U.S.C. § 1964(a)-(c). Section 1961(4) requires that "the enterprise [be] an entity." *United States* v. *Turkette*, 452 U.S. 576, 583 (1981). Such a requirement connotes an enduring venture that has an existence and affairs separate and apart those that participate in it. If RICO required nothing more than a "loose and informal" association to satisfy the enterprise requirement, Congress certainly knew how to say that without employing the terminology used in RICO. *See, e.g.*, 18 U.S.C. § 371. Congress did not even use terms that invoke conspiracy concepts, such as "common plan and scheme," "acting in concert," or even "joint" activities. Indeed, RICO's own conspiracy provision (§ 1962(d)) prohibits only conspiracies to victimize or misuse enterprises, strongly suggesting that enterprises must something different than conspiracies themselves.

activity. See U.S. Br. 16-20. Neither of these objections withstands scrutiny.

A. Most Association-In-Fact Enterprises Simply Could Be Repled.

The United States notes that a single individual often unlawfully conducts the affairs of multiple companies through a pattern of racketeering. See U.S. Br. 16. In these cases, the Government sometimes charged one association-in-fact enterprise consisting of all of those companies (and sometimes the individual defendants as well). The Government implies that it would not be able to bring RICO prosecutions in such cases unless it can plead an association-in-fact enterprise that consists of corporations. An examination of the cases cited by the Government, however, reveals that it could still have prosecuted the misconduct under RICO by repleading the enterprise. In some of these cases, the Government could have charged multiple violations of RICO, naming each corporation as a separate enterprise. Indeed, the cases cited by the Government explicitly make this very point.[12] In other cases, the Government could have charged an association in fact consisting solely of individuals.[13] None of the positions advanced by petitioner would prohibit such repleading.

---

[12] *See United States* v. *Feldman*, 853 F.2d 648, 655 (9th Cir. 1988) (cited in U.S. Br. 16 & 17 n.8) (explaining that, in face of association-in-fact enterprise encompassing seven corporations, "[e]ach individual corporation is in itself a legal entity and, alone, may be charged as the RICO enterprise"); *United States* v. *Stolfi*, 889 F.2d 378, 380 (2d Cir. 1989) (cited in U.S. Br. 18 n.9) (noting that two legal entities "may often have functioned as separate and distinct organizations and may have been capable of being separate enterprises for RICO purposes").

[13] For instance, *United States* v. *Goldin Industries, Inc.* involved a father and three sons using three scrap metal businesses controlled by the family to defraud customers. 219 F.3d 1271, 1273 (11th Cir. 2000) (cited in U.S. Br. 16 and Resp. Br. 38). Although the Government alleged an enterprise consisting of both individuals and the corporations, the

Apparently anticipating that petitioner would explain that these RICO cases could be repled, the Government raises a second objection: "it may be difficult ... to prove the requisite 'pattern of racketeering activity' with respect to any *single* corporation." U.S. Br. 18. The Government then explains that some individual may engage in repeated criminal acts, but would be careful not to engage in more than one act per corporation. The Government can offer only one purported example: *United States* v. *Butler*, 954 F.2d 114 (2d Cir. 1992) (cited in U.S. Br. 18 n.9). But *Butler* itself does not even match the far-fetched fact pattern the Government imagines. In *Butler*, the Government indicted an individual committing numerous acts of fraud on and embezzlement from two separate unions (one based in New York and the other in Florida) and making numerous false statements related to four different pension plans. See *id.* at 118-20. Although the court affirmed the Government's alleged omnibus association-in-fact enterprise consisting of all the entities combined, each of these entities could have been pled as a separate enterprise in light of the repeated frauds and false statements related to each. See *id.*

B. The Government Has Ample Avenues To Disgorge Criminal Proceeds.

Finally, the Government claims that using § 1962(c) of RICO to prosecute "the blameworthy corporate officers ... would not enable the Government to obtain forfeiture of ... profits the corporation may have realized." U.S. Br. 19. The Government, however, ignores the many means by which it can force a corporation to disgorge such criminal proceeds.

As petitioners previously noted (Pet. Br. 41-42), the Government may be able to pursue corporate wrongdoers

---

Government could have alleged an enterprise of the four individuals associated in fact. *See also United States* v. *Perkins*, 596 F. Supp. 528 (E.D. Pa. 1984) (cited in U.S. Br. 17 n.8) (enterprise could have been association-in-fact of three individuals).

under § 1962(a) and (b) of RICO. Even outside of RICO, the Government can still obtain ample remedies against a corporation that ensure that the corporation does not benefit from criminal activity. Because "[a] corporation may be convicted for the criminal acts of its agents, under a theory of respondeat superior," a corporation can be criminally liable for underlying predicate offenses committed by its officers, directors, and employees. *United States* v. *Cincotta*, 689 F.2d 238, 241 (1st Cir. 1981). Once the Government obtains convictions for those offenses, it has numerous tools at its disposal, including fines, forfeiture, and restitution. *Any* corporation convicted of *any* felony is subject to a significant criminal fine: either $500,000 per felony or, alternatively, the greater of "*twice* the gross gain [that the defendant realizes from the offense] or *twice* the gross loss [that the offense causes]." 18 U.S.C. § 3571(c)(3), (d) (emphasis added).[14]

In addition, many felony criminal convictions (including convictions for many of the crimes that are RICO predicate offenses) require the sentencing court to order criminal forfeiture of the gross proceeds of the offense and other property used in the commission of the offense.[15] See, *e.g.*, 18 U.S.C. § 982. The Government also may seek civil forfeiture of any property that "constitutes or is derived from proceeds traceable to a violation" of a number of crimes,

---

[14] Such an alternative fine can be substantial. For instance, in the Government's unsuccessful prosecution of Tyson Foods, Inc. for allegedly hiring illegal workers, the prosecutors "calculated Tyson's financial exposure at $139 million." S. Kilman, *Tyson Alien-Smuggling Trial Promises to Prove a Landmark*, Wall St. J. A2 (Feb. 3, 2003).

[15] For example, conviction on any of the immigration offenses that respondents have alleged would require forfeiture of "any property real or personal" obtained from the crime, "any conveyance used," and "any property ... that is used to facilitate" the crime. 18 U.S.C. § 982(a)(6)(A). And a conviction of the methamphetamine-producing pharmaceutical company that the Government hypothesizes would require the criminal forfeiture of any proceeds of the crime and all of the property used in the crime. *See* 21 U.S.C. § 853(a); *see also id.* § 881 (civil forfeiture).

including all but one of the crimes that are listed as RICO predicate acts in § 1961(1). 18 U.S.C. § 981(a)(1)(C) (allowing civil forfeiture for any offense constituting "specified unlawful activity" under § 1956(c)(7)); see *id.* § 1956(c)(7) (defining "specified unlawful activity" to include all but one of the offenses listed in § 1961(1)).[16]

In sum, even apart from RICO, the United States has a full arsenal at its disposal to force corporations to disgorge any ill-gotten gains. The strength of these available remedies helps explain why the Government has not relied on RICO in recent high-profile corporate fraud cases, including the Enron, WorldCom, and HealthSouth prosecutions.[17] In fact, none of the 170 charging documents on the website of the President's Corporate Fraud Task Force alleges a single RICO count.[18] There is simply no need to convert RICO into a corporate catch-all civil liability statute to ensure effective criminal law enforcement.

---

[16] Without citation or explanation, the Government also asserts that it may not be able "to obtain effective relief in cases involving the corruption of labor unions." U.S. Br. 20. The Government can prosecute the unions themselves under RICO if such unions participated in the conduct of the affairs of the "benefit plans" or other "legal entities" the Government mentions. Aside from RICO, the Government also has at its disposal all of the other prosecutorial tools and remedies. In addition, respondents point to a loan-sharking ring in which the individuals constitute an association in fact and suggest that such a claim would fail on petitioner's theory. *See* Resp. Br. 35-36. But none of petitioner's contentions applies to an association-in-fact comprised of individuals.

[17] *See* Superseding Indictment, *United States* v. *Ebbers*, No. 1:02 Cr. 1144 (S.D.N.Y. Sept. 15, 2004); Superseding Indictment, *United States* v. *Lay*, Cr. No. 4:04-cr-00025-3 (S.D. Tex. July 7, 2004); Indictment, *United States* v. *Scrushy*, No. 2:03-cr-00530-KOB (N.D. Ala. Oct. 29, 2003).

[18] U.S. Dep't of Justice, President's Corporate Fraud Task Force: Significant Criminal Cases & Charging Documents, *at* http://www.usdoj.gov/dag/cftf/cases.htm (visited Apr. 10, 2006).

IV. RESPONDENTS' IMMIGRATION LAW ARGUMENTS ARE MISPLACED.

Respondents together with their *amici* (but not the United States) contend that despite RICO's requirements, this suit should be permitted because Congress added violations of 8 U.S.C. § 1324, including the felony hiring of illegal aliens, to RICO's list of predicate acts.[19] This addition, however, did not dispense with RICO's other requirements. In fact, in the routine case where a single employer unilaterally recruits and hires illegal aliens, a RICO suit cannot be brought against the employer because it is not distinct from the enterprise. Likewise, here, for the reasons set forth above, respondents have not pled a claim that complies with RICO's requirements.

CONCLUSION

The judgment of the Eleventh Circuit should be reversed.

---

[19] Much of respondents' argument is built upon their misunderstanding of the enactment of the relevant laws. Respondents claim that Congress added the felony hiring provision to 8 U.S.C. § 1324 and *then* made § 1324 a RICO predicate act. *See* Resp. Br. 8-11. *Accord* NASCAT Br. 1-2; *cf.* ImmPAC. Br. 2. In fact, respondents and their amici get the order of these actions backwards: § 1324 was added as a RICO predicate act before Congress made the hiring of illegal aliens a felony. *See* Antiterrorism and Effective Death Penalty Act, § 433, Pub. L. No. 104-132, 110 Stat. 1214, 1274 (Apr. 24, 1996) (adding 8 U.S.C. § 1324 as RICO predicate); Illegal Immigration Reform & Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 203(b)(4), 110 Stat. 3009-546, 3009-566 (Sept. 30, 1996) (adding felony hiring provision to § 1324). The legislative history of this amendment to RICO suggests that Congress acted to "combat alien smuggling organizations." H.R. Rep. No. 104-22, at 6. *See also, e.g.*, 139 Cong. Rec. S9923 (daily ed. July 30, 1993) (remarks of Sen. Simpson) (stating that "I support using [RICO] to prosecute organized smuggling gangs").

Respectfully submitted,

CARTER G. PHILLIPS*
RICHARD D. BERNSTEIN
JUAN P. MORILLO
STEVEN T. COTTREAU
JULIE A. GURLEY
MATTHEW J. WARREN
JIMMY R. ROCK
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

Counsel for Petitioner

April 11, 2006

* Counsel of Record